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In the Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES, PLAINTIFF IN error,
vs.
JOHN D. SANBORN.
} No. 224.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

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I.

STATEMENT OF FACTS.

In April, 1886, the cause of the United States against John D. Sanborn was pending in the circuit court of the United States for the district of Massachusetts. A trial was had resulting in a judgment in favor of the plaintiff against Sanborn in the sum of $13,052.08, and costs of suit. (Rec., p. 19.)

At the trial of the cause the United States called as witnesses to testify, W. J. Morris, a clerk in the Internal Revenue Bureau, and John T. Masters, a clerk in the office of the Secretary of War.

These witnesses attended the trial at the instance and in behalf of the Government.

After the trial a question arose as to the manner of taxing costs in the case. Morris and Masters presented to the clerk an itemized bill of their expenses in going from Washington to Boston to attend the trial. The clerk, in the taxation of the costs, refused to allow these bills, or any part of them, but did allow them $1.50 per day, each, for their attendance, and mileage at the rate of 5 cents per mile for a distance of 100 miles from the place of trial.

Exceptions were taken by both sides. The matter was thereafter brought before the circuit court, and Mr. Justice Gray, holding said court, modified the findings and allowances made by the clerk, and held that the Government clerks above named were not entitled to per diem or mileage; that nothing could be taxed in the bill of costs on their account, and that their bills for expenses could not be allowed. In other words that, being in the employ of the Government, they could not be treated, or their costs taxed, as in the case of ordinary witnesses; that they could claim only their necessary expenses, and that the bills of expenses were to be and should be paid out of the United States Treasury, and not by the party against whom judgment was rendered in the case.

From this decision the United States appealed. It is important mainly as a matter of practice.

ASSIGNMENT OF ERRORS.

The United States assigns the following errors and prays that the judgment be revised so far as the taxation of costs is concerned and not otherwise:

1st. That the circuit court ruled and decided that upon the facts set forth in the record nothing could be taxed in the plaintiff's bill of costs for the travel and attendance of the Government clerks, whereas the court should have ruled that the travel and attendance of said clerks should have been taxed in the plaintiff's bill of costs.

II.

BRIEF AND ARGUMENT.

The statute governing the taxation of costs in the case of witnesses generally (Rev. Stat., Rec. 848) is in the following words:

> For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpœnaed in more than one cause between the same parties, at the same court, only one travel fee and one per diem compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the per diem attendance fee alone shall be taxed in the other cases in the order in which they are disposed of.
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> When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of one dollar a day.

It will doubtless be conceded that, in the absence of any other provision of law affecting or modifying the foregoing, that the per diem and mileage of Morris and Masters should have been included in the plaintiff's bill of costs, and so the clerk held. But Congress seems to have been of opinion that a different rule should prevail in the case of witnesses who are in the employ of the Government, and hence section 850 of Revised Statutes was enacted, which reads as follows:

> SEC. 850. When any clerk or other officer of the United States is sent away from his place of business as a witness for the Government, his necessary expenses, stated in items and sworn to, in going, returning, and attendance on the court, shall be audited and paid; but no mileage, or other compensation in addition to his salary, shall in any case be allowed.

It is contended that the last-named section establishes a wholly different rule as to a witness who is in the employ of the Government, and it is upon the ground that his salary covers the time that he is in attendance upon trial as a witness. This is doubtless just, for the reason that he should not receive double pay for his time. His salary as an employé of the Government takes the place of the per diem compensation. The same section, however, makes provision for the payment of his necessary expenses, so that he shall not be a loser on account of attending court. These are, therefore, to be paid to him.

It being admitted that these bills of expenses should be paid, the only contention is as to the source from which payment shall come. Who shall pay these expenses?

Are they to be treated as a part of the costs in the suit, to be charged against the losing party, or shall they come out of the Government Treasury, irrespective of the way in which the case may be decided?

Of course, each party to a suit is primarily liable for his own costs, and the Government would be subjected to the same rule, and should pay the costs and expenses of its witnesses in the first instance. But it is also a rule of almost universal application, founded in reason and sound policy, that the party recovering a judgment against another in an action at law shall also recover his costs. This is upon the theory that the injured party shall be made whole, or as nearly so as possible. He shall therefore not only recover his damages but he shall also recover his costs necessarily made in maintaining his action. There is no reason why the Government should be an exception to this rule. If Sanborn should pay the damages he should also pay the costs; and the expenses of these witnesses are just as much a part of the Government's costs as the per diem and mileage of any other witness called for the plaintiff.

It is contended, however, that the words of the statute are such as to exclude the idea of their taxation by the clerk and payment by the losing party as in ordinary cases.

The language of the statute is that the necessary expenses of the witness in going and returning "shall be audited and paid." It is silent as to the manner of payment or by whom they shall be audited.

The term "audit" means to examine, look over, and

adjust. It is not a word of such technical character as to be applied to the work of only one class of public officers. Anybody who examines an account and adjusts it and determines the amount to be paid can with propriety be said to "audit" it.

Ordinarily the clerk of the court "taxes" costs, and it seems to be contended that when the word "audit" is used it means that some other officer is meant. This does not necessarily follow.

The bill for expenses presented by a witness is a different thing from the ordinary claim for per diem and mileage. The law fixes the per diem and mileage, but the witness himself must furnish the items that enter into his expense account. Hence, when the law fixes the per diem compensation and the mileage of a witness, it is proper to say that his fees shall be "taxed," but where neither of these are fixed by the statute, and it becomes a matter of proof and allowance, the word "audit" would be a proper term to use, even though the clerk should be called upon to do it. If he examines the items of the account and allows, admits, or modifies those items, he can with propriety be said to audit the account, and there is no reason why the term audit should not be used in such a case. It seems to be the natural and appropriate way of directing how the work shall be done by the clerk.

If it had been the intention of Congress that the bills of expenses should be paid by the Government, and not by the party against whom judgment was rendered, and that the proper amount of such expenses should be determined by some officer of the Government other than the

clerk of the court, it is reasonable to infer that the officer whose duty it would be to audit the account would have been named in the statute and the manner of proceeding more fully pointed out.

ALPHONSO HART,
Solicitor of Internal Revenue.

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